

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:
TRACK 1 TRIAL

CIVIL ACTION: 01-CV-12257-PBS
Judge Patti B. Saris

**[PROPOSED] ORDER RE: MOTION FOR NATIONWIDE CLASS
CERTIFICATION AGAINST DEFENDANTS ASTRAZENECA AND BMS**

December __, 2007

Saris, U.S.D.J.

Pursuant to Fed. R. Civ. P. 23, plaintiffs have moved for an order certifying a nationwide class in this action against Defendants AstraZeneca and BMS. After considering the submissions of the parties and the record in this case, including prior class certification proceedings and hearings, I order that plaintiffs' motion for nationwide class certification is **GRANTED** as to the claims asserted in the Fifth Amended Master Consolidated Class Action Complaint ("FAMCCAC"). The Court relies on the reasons stated in (i) court; (ii) *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61 (D. Mass. 2005); (iii) January 30, 2006 Consolidated Order Re: Motion for Class Certification (Docket No. 2097-1); (iv) the findings of fact and conclusions of law set forth in *In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 20 (D. Mass. 2007); and (v) the November 1, 2007 Memorandum and Order regarding final judgment (Docket No. 4867). The classes are certified as follows:

I. CLASSES AND SUBCLASSES CERTIFIED

A. Class 2: Third-Party Pavor MediGap Supplemental Insurance Class

1. Class Definition:

All Third-Party Payors who made reimbursements for drugs based on AWP for a Medicare Part B covered Subject Drug that was manufactured by AstraZeneca (AstraZeneca, PLC, Zeneca, Inc., AstraZeneca Pharmaceuticals L.P., and AstraZeneca U.S.) or the BMS Group (Bristol-Myers Squibb Co., Oncology Therapeutics Network Corp., and Apothecon, Inc.).

2. The Court certifies two Subclasses corresponding to each of defendant group.

3. The Court certifies plaintiffs United Food and Commercial Workers Unions and

Employers Midwest Health Benefits Fund (“UFCW”) and Sheet Metal Workers National Health Fund (“SMW Health Fund”) as the representatives for this Class. These representatives’ claims are typical of those of other class members, and the Court finds them to be adequate representatives.

4. The consumer protection act of each state shall apply to this Class. Specifically, the Third-Party Pavor MediGap Supplemental Insurance Class is certified for claims under the following statutes: (a) Ariz. Rev. Stat. § 44-1522, *et seq.*; (b) Ark. Code § 4-88- 101, *et seq.*; (c) Cal. Bus. & Prof. Code § 17200, *et seq.*, 1770; (d) Colo. Rev. Stat. § 6-1-105, *et seq.*; (e) Conn. Gen. Stat. § 42-110b, *et seq.*; (f) Del. Code § 2511, *et seq.*; (g) Fla. Stat. § 501.210, *et seq.*; (h) Idaho Code § 48-601, *et seq.*; (i) 815 ILCS § 505/1, *et seq.*; (j) Mich. Stat. § 445.901, *et seq.*; (k) Minn. Stat. § 325F.67, *et seq.*; (l) Mo. Rev. Stat. § 407.010, *et seq.*; (m) Neb. Rev. Stat. § 59-1601, *et seq.*; (n) Nev. Rev. Stat. § 598.0903, *et seq.*; (o) N.H. Rev. Stat. § 358-A:1, *et seq.*; (p) N. J. Stat. Ann. § 56:8-1, *et seq.*; (q) N.M. Stat. Ann. § 57-12-1, *et seq.*; (r) N.Y. Gen. Bus. Law § 349, *et seq.*; (s) N.C. Gen. Stat. § 75-1.1, *et seq.*; (t) N.D. Cent. Code § 51-15-01, *et seq.*; (u) Or. Rev. Stat. § 646.605, *et seq.*; (v) S.C. Code Laws § 39-5-10, *et seq.*; (w) S.D. Code

Laws § 37-24-1, *et seq.*; (x) Tenn. Code § 47-18-101, *et seq.*; (y) Tex. Bus. & Com. Code § 17.41, *et seq.* (but only to the extent the TPP has assets less than \$25 million); (z) Vt. Stat. Ann. tit. 9, § 245 1, *et seq.*; (aa) Wash. Rev. Code § 19.86.010, *et seq.*; (bb) W. Va. Code § 46A-6-101, *et seq.*; (cc) Wis. Stat. § 100.18, *et seq.*; and (dd) Wyo. Stat. § 40-12-100, *et seq.*

Plaintiffs allege that they have complied with the notice provisions of all consumer protection acts requiring such notice.

5. This Class is certified pursuant to Fed. R. Civ. P. 23(b)(3).

B. Class 3: Consumer and Third-Party Payor Class for Medicare Part B Drugs Outside of the Medicare Context

1. Class Definition:

All natural persons who made, or who incurred an obligation enforceable at the time of judgment to make, a payment for a physician-administered Subject Drug that was manufactured by AstraZeneca (AstraZeneca, PLC, Zeneca, Inc., AstraZeneca Pharmaceuticals L.P., and AstraZeneca U.S.) or the BMS Group (Bristol-Myers Squibb Co., Oncology Therapeutics Network Corp., and Apothecon, Inc.); and all Third-Party Payors who made reimbursements based on contracts expressly using AWP as a pricing standard for a physician-administered Subject Drug that was manufactured by AstraZeneca or the BMS Group. Included within this Class are natural persons who paid coinsurance (*i.e.*, co-payments proportional to the reimbursed amount) for a Subject Drug, where such coinsurance was based upon use of AWP as a pricing standard. Excluded from this Class are any payments or reimbursements for generic drugs that are based on MAC and not AWP.

2. The Court certifies two Subclasses corresponding to each of defendant group.

3. The Court certifies plaintiffs UFCW, Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust (“PMBT”), Board of Trustees of Carpenters and Millwrights of Houston and Vicinity Welfare Trust Fund (“CMHV”), Teamsters Health & Welfare Fund of Philadelphia and Vicinity (“THWF”), Philadelphia Federation of Teachers Health and Welfare Fund (“PFTHW”), Man-U Service Contract Trust Fund (“Man-U Service Fund”), Cheryl Barreca (for

BMS only), Mary Cauble (for BMS only), Anna Choice (for BMS only), Joyce Dison (for BMS only), Tracy Garcia (for BMS only), Donna Kendall (for BMS only), Sandra Leef (for BMS only), Gerald Miller (for BMS only), Constance Nelson (for BMS only), Andrea Palenica (for BMS only), Regina Shoemaker (for BMS only), Scott Tell (for BMS only), Pauline Vernick (for BMS only), Mardolyn Vescovi (for BMS only), and Susan Wessels (for AstraZeneca only) as representatives for this Class pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3). The Court also certifies Health Care For All as the representative for this Class pursuant to Fed R. Civ. P. 23(b)(2). These representatives' claims are typical of those of other class members, and the Court finds them to be adequate representatives.

4. The consumer protection act of each state shall apply to this Class. Specifically, the Consumer and Third-Party Payor Class for Medicare Part B Drugs Outside of the Medicare Context Class is certified for claims under the following statutes: (a) Ariz. Rev. Stat. § 44-1522, *et seq.*; (b) Ark. Code § 4-88- 101, *et seq.*; (c) Cal. Bus. & Prof. Code § 17200, *et seq.*, 1770; (d) Colo. Rev. Stat. § 6-1-105, *et seq.*; (e) Conn. Gen. Stat. § 42-110b, *et seq.*; (f) 6 Del. Code § 2511, *et seq.*; (g) Fla. Stat. § 501.210, *et seq.*; (h) Idaho Code § 48-601, *et seq.*; (i) 815 ILCS § 505/1, *et seq.*; (j) Mich. Stat. § 445.901, *et seq.*; (k) Minn. Stat. § 325F.67, *et seq.*; (l) Mo. Rev. Stat. § 407.010, *et seq.*; (m) Neb. Rev. Stat. § 59-1601, *et seq.*; (n) Nev. Rev. Stat. § 598.0903, *et seq.*; (o) N.H. Rev. Stat. § 358-A:1, *et seq.*; (p) N. J. Stat. Ann. § 56:8-1, *et seq.*; (q) N.M. Stat. Ann. § 57-12-1, *et seq.*; (r) N.Y. Gen. Bus. Law § 349, *et seq.*; (s) N.C. Gen. Stat. § 75-1.1, *et seq.*; (t) N.D. Cent. Code § 51-15-01, *et seq.*; (u) Or. Rev. Stat. § 646.605, *et seq.*; (v) S.C. Code Laws § 39-5-10, *et seq.*; (w) S.D. Code Laws § 37-24-1, *et seq.*; (x) Tenn. Code § 47-18-101, *et seq.*; (y) Tex. Bus. & Com. Code § 17.41, *et seq.* (but only to the extent the TPP has assets less than \$25 million); (z) Vt. Stat. Ann. tit. 9, § 245 1, *et seq.*; (aa) Wash. Rev. Code § 19.86.010, *et seq.*

seq.; (bb) W. Va. Code § 46A-6-101, *et seq.*; (cc) Wis. Stat. § 100.18, *et seq.*; and (dd) Wyo. Stat. § 40-12-100, *et seq.* Plaintiffs allege that they have complied with the notice provisions of all consumer protection acts requiring such notice.

5. The Court certifies a consumer Subclass for purposes of applying the following, additional consumer protection acts (which do not afford a legal remedy to commercial entities like TPPs): (a) D.C. Code § 28-3901, *et seq.*; (b) Haw. Rev. Stat. § 480, *et seq.*; (c) Ind. Code Ann. § 24-5- 0.5.1, *et seq.*; (d) Kan. Stat. § 50-623, *et seq.*; (e) Md. Com. Law Code § 13-101, *et seq.*; (f) Okla. Stat. tit. 15 § 751, *et seq.*; (g) 73 Pa. Stat. § 201-1, *et seq.*; and (h) R.I. Gen. Laws. § 6-13.1-1, *et seq.*

II. MISCELLANEOUS

1. The Class Period for Class 2 and Class 3 is January 1, 1991 to January 1, 2005.

2. Excluded from these Classes are: any subsidiaries or affiliates of defendants; the officers and directors of defendants during the Class Period; members of defendants' immediate families; any person, firm, trust, corporation, officer, director, or any individual or entity in which any defendant has a controlling interest or which is related to, or affiliated with, any defendant; the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded parties and governmental entities.

3. Pursuant to Fed. R. Civ. P. 23(g), the Court appoints the following firms as Co-Lead Counsel: Hagens Berman Sobol Shapiro LLP; Spector Roseman & Kodroff, P.C.; Hoffman & Edelson LLC; and Wexler Toriseva Wallace LLP.

5. The Court retains the discretion under Rule 23 to modify this Order.

6. The Court declines to certify issues for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or to recommend appeal pursuant to Fed. R. Civ. P. 23(f).

7. Trial of the claims on behalf of the Classes will commence on _____, 2008.

HONORABLE PATTI B. SARIS
United States District Judge

TABLE OF SUBJECT DRUGS

ASTRAZENECA

<u>NDC</u>	<u>Description</u>
00310096036	Zoladex 3.6mg 1x1EA Depot
003100961 30	Zoladex 10.8mg 1x1EA Depot
00310095130	Zoladex 10.8mg 1x1 EA Depot
00310095036	Zoladex 3.6mg 1x1EA Depot

BMS GROUP

<u>NDC</u>	<u>Description</u>
00015301026	BLENOXANE INJ 15 UNIT VHA
00015301020	BLENOXANE INJ 15 UNIT VL
00015306326	BLENOXANE INJ 30 UNIT VHA
00015306301	BLENOXANE INJ 30 UNIT VL
00590032435	COUMADIN INJ. 5MG VIAL
00015053910	CYTOXAN 100MG LYOPH W/CYT
00015054812	CYTOXAN 1G 6X50ML VHA+
00015054810	CYTOXAN IGM LYOPH W/CYTOG
00015054610	CYTOXAN 200MG LYOPH W/CYT
00015054912	CYTOXAN 2G 6X100ML VHA+
00015054910	CYTOXAN 2GM LYOPH W/CYTOG
00015054710	CYTOXAN 500MG LYOPH W/CYT
00015050001	CYTOXAN FOR INJ 100 MG
00015050041	CYTOXAN INJ 100MG
00015050641	CYTOXAN INJ IX2GM VIAL
00015050241	CYTOXAN INJ 1X500MG VIAL
00015050141	CYTOXAN INJ 200MG
00015054712	CYTOXAN LYO 500MG VL VHA
00015054741	CYTOXAN LYOPH 500MG
00015053941	CYTOXAN LYOPHILIZED 100MG
00015054841	CYTOXAN LYOPHILIZED 1GM
00015054641	CYTOXAN LYOPHILIZED 200MG
00015054941	CYTOXAN LYOPHILIZED 2GM
00015050541	CYTOXAN PINJ 1X1G VIAL
00015050303	CYTOXAN TABLETS 50 MG
00015050302	CYTOXAN TABLETS 50MG
00015050401	CYTOXAN TABS 25MG
00015050301	CYTOXAN TABS 50MG
00015050348	CYTOXAN TABS 50MG
00015340420	ETOPOPHOS 100MG VIAL
00015321429	PARAPLATIN 10X15ML VHA+
00015321529	PARAPLATIN 10X45ML VHA+
00015321329	PARAPLATIN 10X5ML VHA+
00015321410	PARAPLATIN 150MG LYOPH CY
00015321430	PARAPLATIN 1X150MG LYO VL
00015321530	PARAPLATIN 1X450MG LYO VL
00015321510	PARAPLATIN 450MG VL W/CYT
00015321330	PARAPLATIN 50MG LYOPHILIZ
00015321310	PARAPLATIN 50MG W/CYTO
00015335322	RUBEX 100 MG LYOPHILIZED
00015335324	RUBEX 100MG IMMUNEX LABEL
00015335124	RUBEX 10MG IMMUNEX LABEL
00015335122	RUBEX 10MG LYOPHILIZED

00015335224	RUBEX 50MG IMMUNEX LABEL
00015335222	RUBEX 50MG LYOPHILIZED
00015347630	TAXOL 100MG INJ MULTIDOSE
00015347627	TAXOL 100MG SEM-SYN VIAL
00015347620	TAXOL 100MG/16.7ML VHA+ L
00015347911	TAXOL 300MG/50ML VIAL
00015345620	TAXOL 30MG CONC FOR INJ
00015347530	TAXOL 30MG INJ MULTIDOSE
00015347527	TAXOL 30MG SEM-SYN VIAL
00015347520	TAXOL 30MG/5ML VHA+ LABEL
00015309510	VEPESID 100MG VIAL W/CYTO
00015309530	VEPESID 100MG VL W/O CYTO
00015306224	VEPESID 1G 50ML VIAL VHA+
00015306220	VEPESID 1GM/50ML
00015306120	VEPESID 500MG
00015306124	VEPESID 500MG 25ML VL VHA
00015309145	VEPESID 50MG CAPSULES
00015309520	VEPESID INJ 100MG/5ML
00015308420	VEPESID INJ 150MG/7.5ML

CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on November 21, 2007, I caused copies of [PROPOSED] ORDER RE: MOTION FOR NATIONWIDE CLASS CERTIFICATION AGAINST DEFENDANTS ASTRAZENECA AND BMS to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman